

a UNITED OVERSEAS BANK (MALAYSIA) BHD

v.

SOON KIN FAH & ANOR

b HIGH COURT MALAYA, TEMERLOH
RAMLY ALI JC
[ORIGINATING SUMMONS NO: 24-67 OF 2000]
2 JULY 2001

c **LAND CHARGE:** *Charge - Order for sale - Default in repaying overdraft facility - Third party charge - Whether charge prohibited by any written law - Amount claimed - Whether amount claimed by the plaintiff is correct - Interest - Whether plaintiff entitled to charge interest - Notice of default - Form 16D - Validity of - Whether form must be issued and signed by the chargee personally - Section 254(1) National Land Code 1965 - Cause to the contrary*
d *- Whether established - Section 256(3) National Land Code 1965*

CIVIL PROCEDURE: *Res judicata - Issue estoppel - Order for sale of charged land - Earlier action dismissed - Whether present proceedings barred by res judicata*

e **WORDS & PHRASES:** *“Cause to the contrary” - Section 256 National Land Code 1965*

f This was an action by the plaintiff for an order of sale of land registered under the defendants’ name, to recover a sum of money due to the plaintiff. The defendants had earlier created a third party charge (the “charge”) in favour of the plaintiff as consideration of an overdraft facility granted to a borrower. Following the borrower’s default on the repayment, the plaintiff subsequently issued form 16D pursuant to the National Land Code 1965 (the “NLC”) demanding the defendants to remedy the default within seven days upon receipt of the form. As it transpired, the defendants failed to comply with the request, and hence, this action. The defendants, in objection, contended that; (i) the charge is a third party charge where the defendants are not the borrowers nor the guarantors; (ii) amount claimed by the plaintiff is not correct; (iii) interest charged was not based on the relevant agreements; (iv) statutory form 16D pursuant to the NLC is invalid; and; (v) the issues of *res judicata* apply in
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h this application.

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Held:

- [1] There is no indication anywhere to show that a third party charge is not acceptable or valid. Even though the chargors are not the borrowers nor the guarantors to the overdraft facility, a third party charge is valid if properly documented and voluntarily given by the chargors.
- [2] The amount claimed by the plaintiff is actually the total amount overdrawn by the borrower in excess of the limit set, plus the relevant interest charged. The maximum amount limited under the facility is different from the amount actually overdrawn, plus the interest, as claimed by the plaintiff. It is normal in a situation like this for the amount claimed to exceed the amount of the maximum limit of the facility. Had the defendants or the borrowers obediently made payment promptly, the amount claimed would not exceed the maximum limit of the facility.
- [3] From the relevant documents, *ie*, the charge documents and a letter of offer, which were signed and agreed upon by the defendants and the borrower, it is clear that the plaintiff can charge interest on the sum due under the facility. The defendants' contention that the plaintiff cannot charge "penalty interest" is also baseless, as the contents of the charge documents cater for the imposition of such "penalty interest".
- [4] Form 16D is a statutory notice which may be served by the chargee on the chargor under s. 254(1) of the NLC. There is nothing in the section to say that the form must be issued and signed by the chargee personally. It can be issued and signed by any other person including a solicitor, "on behalf of the chargee". Section 62 of the Interpretation Act 1967 seems to support this finding. There is no question that Form 16D in this instance is perfectly valid and in accordance with the NLC.
- [5] The plaintiff had earlier filed another application for an order of sale on the same property which was subsequently dismissed. In view of this, the defendant is now contending that the issue of *res judicata* applies, and that the plaintiff is barred from taking the present proceedings. Following the binding authorities of *Kandiah Peter v. Public Bank* and *Low Lee Lian v. Ban Hin Lee Bank Bhd*, the issue of *res judicata* does not apply in this case. Accordingly, the defendants have failed to meet the requisite legal test of what amounts to a "cause to the contrary" for the purpose of s. 256(3) of the NLC. On this basis, an order for sale of the property is made on behalf of the plaintiff.

[Order for sale granted.]

a Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 (**foll**)
Bank Bumiputra Malaysia Bhd v. Mahmud Hj Mohamed Din & Anor [1989] 1 CLJ 1048 (**foll**)

Citibank Bhd v. Mohamed Khalid Farzalur Rahaman & Ors [2000] 3 CLJ 739 (**foll**)
Jacob v. Oversea – Chinese Banking Corporation, Ipoh [1974] 2 MLJ 161 (**foll**)

b *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332 (**foll**)
Keng Soon Finance Bhd v. MK Retnam Holding Sdn Bhd & Anor [1989] 1 CLJ 897 (**refd**)

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 (**foll**)
Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 CLJ 8 (**foll**)

c *Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd* [1984] 1 MLJ 115 (**foll**)
VRKRS Chettiappah Chetty v. Raja Abdul Rashid Ibni Almarhum Sultan Idris [1933] MLJ 18 (**foll**)

Legislation referred to:

d Interpretation Acts 1948 & 1967, s. 62
National Land Code 1965, ss. 253(1), 254(1)(b), 256(3), 257(1)(c), form 16D
Rules of the High Court 1980, O. 83

For the plaintiff - Mohd Aznel Azaharudin; M/s Kam Woon Wah

For the defendants - Zulkifli Osman; M/s Zul & Co

e *Reported by Raja Vishnu Sivarajah*

JUDGMENT

Ramly Ali JC:

f Facts Of The Case

g On 1 March 2000 the plaintiff applied for an order for sale of land held under H.S (D) 1848, No. P.T 7959 Mukim Gali, Daerah Raub Pahang (the said property) and registered under the defendants' name, pursuant to s. 256 of the National Land Code 1965 (NLC) and O. 83 of the Rules of the High Court (RHC) to recover a sum of RM90,644.85 due to the plaintiff as at 8 September 1999. The said property was charged by the defendants on 30 June 1993, in favour of the plaintiff *vide* Gadaian Perserahan No: 2947/93, Jilid 323, Folio: 22 (the said charge), as a consideration for an overdraft facility granted to one Cata Enterprise Sdn Bhd (the borrower) for a sum of RM100,000, *vide* a letter of offer dated 8 June 1993. The charge is commonly known as a "third party charge" – i.e. a charge by a registered proprietor over his land to secure a loan or credit facility made by the lender to a third party.

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The said borrower (Cata Enterprise Sdn Bhd) had defaulted in repayment of the overdraft facility. The plaintiff then issued a notice of demand on both the defendants on 17 November 1999. Failing to get any response within the time given, the plaintiff then proceeded to issue form 16D (NLC) to the defendants on 9 December 1999 demanding the defendants to remedy the default pursuant to the said charge, within seven days from the receipt of the said form. The defendants failed to comply with the request made in the said form 16D after the period of seven days had lapsed.

As at 8 October 1999, the sum due to the plaintiff was RM90,644.85, together with interest at the rate 1.5% per annum above base lending rate (BLR) (which was 6.80% at that time) calculated on monthly basis.

As required by s. 257(1)(c) NLC and O. 83 RHC, the plaintiff had served “notis temu janji” and “afidavit tambahan mengenai akaun terkini” on the defendants.

Case For the Defence

The defendants objected the said application. In their defence, the defendants raised various issues as follows:

- i) that the said charge is a third party charge where the defendants are not the borrowers nor the guarantors;
- ii) that the amount claimed by the plaintiff is not correct;
- iii) that the interest charged was not based on the relevant agreements;
- iv) that the statutory form 16D (NLC) is invalid;
- v) that the issues of “*res judicata*” applies in this application.

Findings Of The Court On The Issues Raised

The plaintiff’s application is made under s. 256 NLC. Subsections (3) of the said s. 256 reads:

- (3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

In dealing with this application, I am delighted to be guided by the following principles which were laid down by the Supreme Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36:

- a* A judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. This being the case, the trial Judge must first be concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O. 83 Rules of the High Court 1980 have been complied with. And next, he must be concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary. In this last respect, if the Judge is satisfied that the chargor has shown cause to the contrary, he will refuse an order for sale. Otherwise he will grant the chargee's application".
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- c* In *Keng Soon Finance Bhd v. MK Retnam Holding Sdn Bhd & Anor* [1989] 1 CLJ 897, the Privy Council held that s. 256(3) of the National Land Code is mandatory, in the sense that the court "shall" order the sale unless it is satisfied the existence of "cause to the contrary". The court is entitled to refuse an order for sale of charged property only if it satisfied the existence of "cause to the contrary". What is meant by "cause to the contrary".
- d* In *Low Lee Lian v. Ban Hin Lee Bank Bhd (supra)*, the Supreme Court held:
- A chargor may show cause to me contrary under section 256(3) of the Code, (i) by demonstrating that the charge is defeasible upon one or more of the grounds specified under subsection (2) and (4)(b) of the section 256; (ii) by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale, such as failure to make a demand or service of a notice in Form 16D, or that the notice of demand's sum not lawfully due from the charge; (iii) by demonstrating that its grant would be contrary to some rule of law or equity.
- e*
- f* So, in the present case, what the defendants are doing in raising those issues is just to raise "cause to the contrary", so that an order for sale under s. 256(3) NLC should not be made.
- g* I shall now deal with the issues raised by the defendants one-by-one to see whether they or any one of them manage to raise "cause to the contrary".
- 1st Issue: Third Party Charge**
- h* The defendants contended that they were not the borrowers nor the guarantors to the overdraft facility granted by the plaintiff. They further contended that the charge in question is a third party charge. Their submissions on this issue stopped there. I am not really sure what the defendants really want to achieve by raising such issue. They are not contesting the validity of the charge, neither they dispute any liabilities of the defendants under the charge.
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In law, a third party charge is perfectly legal and being accepted by the banking and legal profession. It is a valid charge, as in the case of ordinary charge, and binds both the chargor and the chargee. The issue of a third party charge was dealt with and accepted by the Supreme Court in *Low Lee Lian's* case (*supra*) where in his opening speech, Gopal Sri Ram JCA (sat as SCJ) had this to say:

This is commonly known among the members of the legal profession as a "third party charge". It denote a charge by a registered proprietor over his land to secure a loan by the lender to a third party. As correctly submitted by the counsel, it is nothing more than a secured guarantee.

So far, there is no indication anywhere to show that a third party charge is not acceptable and not valid. Even though the chargors are not the borrowers nor the guarantors to the loan or overdraft facility, a third party charge is valid if properly documented and voluntarily given by the chargors. Thus this issue is not relevant and not to be considered by the court.

2nd Issue: The Amount Claimed Is Incorrect

The defendants argued that the amount of the overdraft had been reduced from the original amount of RM100,000 to RM50,000 with effect from 1 June 1999. The claim made by the plaintiff in this case is for a sum of RM90,644.85 i.e. more than RM50,000. Thus the defendants argued that the order for sale of the said property should not be granted.

The original amount granted under the facility was up to an aggregate sum of RM100,000, as clearly stated in the offer letter dated 18 June 1993 (exh. "A" to encl. 13) and the charge annexure (para 1.1.). However, cl. 5.4 to the said offer letter, provides that the said facility "is further subjected to an annual reduction of RM10,000 per year with effect from 1 June 1994 until grounded at RM30,000". Going by that analogy, the aggregate amount under the facility as at 1 June 1997 was RM70,000. The borrower had exceeded the amount at that time and failed to make payment as requested by the plaintiff. Thus, on 22 April 1998 the plaintiff issued the first form 16D to the defendants followed by an application to the High Court in Temerloh for an order of sale of the said property *vide* case No: 24-123-98. (However the said application was dismissed by the court on the ground that the statutory notice in form 16D was defective). The amount RM90,644.85 claimed by the plaintiff is actually the total amount overdrawn in excess of the limit set as at 8 October 1999 plus the relevant interest charged. The maximum amount

- a* limited under the facility (either originally or after being reduced annually) is different from the amount actually overdrawn plus the interest as claimed by the plaintiff. At any one time, if the borrower had exceeded the limit provided under the facility, the total amount claimed by the plaintiff would obviously be more than the limit. The element of interest is also included in the amount
- b* claimed. Thus, it is normal in a situation like this, the amount claimed exceeds the amount of the maximum limit of the facility. Had the defendants or the borrower obediently made payment promptly and regularly under the facility, the amount claimed would never exceed the maximum limit of the facility, at any time. Thus this 2nd issue is baseless and without merit.

c **3rd Issue: Interest Charged**

- The defendants also disputed the interest charged by the plaintiff. They contended that the charge documents do not provide for any interest to be charged, thus the plaintiff cannot do so for the account of the defendants. The
- d* defendants also contended that the element of interest was only to be found in the offer letter (being 1.5% per annum above BLR) and any changes to the rate must be notified to the borrower. The defendants argued that the plaintiff had charged the borrower 2% per annum above BLR (exceeding 1.5%) and no prior notice ever given to the borrower.
- e* In the first place, I was quite surprised when the defendants said that in an overdraft transaction, the plaintiff, as a licenced financial institution cannot charge interest on the account of the customers for the facility. No financial institution would want to lend money or provide overdraft facility to any body without being able to charge interest. In fact, the issue of interest in any
- f* banking facility is their bread and butter, without it, there would be no banking business. There is no such thing as 'interest - free' loan or overdraft from any financial institution or even from any body.

- The relevant documents in this case are the charge document (annexure to form 16A) and the letter of offer dated 18 June 1993 (both are in exh. "A" to
- g* encl. 3). Both the documents were duly agreed upon, accepted and signed by both the defendants and the borrower. Clause 1 of the letter of offer provides:

1. Facility

- h* RM100,000.00 - for Overdraft in your Current Account No: 348-304-518-0 repayable on demand at an interest rate of 1.5% per annum over Lee Wah Bank Ltd.'s Base Rate with monthly rests."

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Clause 7.4 of the said letter further provides:

7.4 The interest rate, is subject to variation from time to time at that Bank's discretion in the light of prevailing money market and such amended rate shall be payable by you as from the date specified in a notice in writing served on you by the Bank.

The charge document (form 16A) at p. 2, also provides for the interest to be charged by the plaintiff. First paragraph at p. 2 thereof, provides:

Dengan ini menggadaikan tanah tersebut untuk membayar kepadanya wang yang tersebut itu berserta faedah keatasnya, jika ada, mengikut peruntukan-peruntukan yang dilampirkan bersama ini.

Clause 1.1 to the charge annexure to the said form 16A under the title “covenant to pay” also provides:

... up to an aggregate sum of Ringgit Malaysia: One Hundred Thousand only (RM100,000) **together with interest** accruing on the principal (as well after as before any demand or judgment) to date of full payment at such rate as the Bank may from time to time prescribe

With all those provisions which had been agreed upon and accepted, it is abundantly clear that the plaintiff can charge interest on the sum due under the facility. Necessary notice was also given (in writing) to the borrower as required by those documents. The notice dated 16 February 1998 (exh. "D1" - defendants affidavit (encl. 10) clearly states:

Please be informed that with immediate effect the interest rates chargeable on your account has been revised to 2% over the Bank's Base Lending Rate with monthly rests.

The defendants also raised the issue on “penalty interest”. The defendants alleged that since the charge documents do not provide for “penalty interest” the plaintiff also cannot charge “penalty interest”. Here again, I think the defendants or their counsel have not really studied the contents of the charge documents before forwarding this issue on “penalty interest”. Clause 52, with the title “additional interest and default rate” clearly caters for this issue i.e. imposition of 1% “penalty interest” above the relevant prescribed rate. Clause 52.1 talks about “penalty interest’ on sums overdrawn exceeding the limit of the facility while cl. 52.2 talks about “penalty interest” when the borrower or the chargor shall default in the payment on the due date of any money payable. Thus, this issue raised by the defendants is also baseless and to be dismissed.

a **4th Issue: Statutory Notice Form 16D Invalid**

The defendants also raised the issue that the statutory notice in form 16D (NLC) issued by the plaintiff was invalid, on the grounds that:

b i) the plaintiff had failed to issue a valid notice of demand on the defendants before issuing the said form 16D; and

ii) the said form 16D was defective as it was issued and signed by the plaintiff's solicitors, not by the plaintiff themselves.

c As to the first ground, the defendants argued that the said notice of demand dated 17 November 1999 issued by the plaintiff's solicitors (which was received by them on 19 November 1999) gave only seven days grace period for them to remedy the default. They further contended that the notice of demand was invalid because the grace period given (seven days) was shorter than one month as stipulated under s. 254(1) NLC.

d To deal with this ground, it is necessary at this stage to determine whether or not a notice of demand from the chargee to the chargor is necessary before issuing form 16D. Section 254(1)(b) NLC provides that "where in the case of any charge, any such breach of agreement as is mentioned in s. 253(1) has been continued for a period of at least **one month or such alternative period as may be specified in the charge**, the chargee may serve on the chargor a notice in Form 16D requiring the breach to be remedied **within one month of the date on which the notice is served, or such alternative period as may be specified in the charge**".

f Section 254(1) NLC talks about two different grace periods to be given to the chargor before the chargee can apply for an order of sale of the property, the subject matter of the charge. The first one refers to the period where a breach of the charge agreement by the chargor has been accruing and continuing before form 16D is issued; while the second one refers to the period given under form 16D itself to enable the chargor to remedy the said breach.

g The first one is "pre – form 16D" while the second one is "post – form 16D". For the second one, the period runs from the date when form 16D is served on the defendant. The question is when does the first period start? As I have said earlier, the first period refers to the period where a breach of the charge agreement by the chargor has been accruing and continuing before form 16D is issued. It talks about a breach of the charge agreement as stated in s. 253(1) NLC. A breach of the charge agreement must refer to the failure or default on part of the chargor to fulfil his obligation or liability under the charge

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agreement. The chargor's obligation or liability to pay the chargee under cl. 1.1 of the charge agreement is based on the "demand" made by the chargee. Clause 29 of the charge annexure also specified that a breach by the chargor of any agreement terms, stipulations and undertakings thereunder shall include a breach of "the agreement of covenant to pay the sum for the time being owing to the bank **on demand**". Thus under cl. 1.1 of the charge agreement, there must be a notice of demand issued by the chargee to the chargor. If the chargor fails to comply with the demand, then the first period should have run at the expiry of the grace period given under the notice of demand for the chargor to settle the amount due as claim therein, and ends when form 16D is issued by the chargee. That period shall not be less than one month or such alternative period as may be specified in the charge. Without a notice of demand prior to the issuance of form 16D, the chargor cannot be said to be in breach of the charge agreement. In other words, the said notice of demand is necessary not only to fulfil the requirement of cl. 1.1 of the charge agreement but also to enable us to compute the first period for the purpose of s. 254(1) NLC i.e. when the period starts. In *Low Lee Lian's* case (*supra*) the Federal Court had ruled that one of the grounds a chargor can show cause to the contrary under s. 256(3) NLC is "by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale, such as failure **to make a demand** or service of a notice in form 16D or **that the notice of demand's sum not lawfully due from the charge**". My understanding of the above ruling is that if the chargor can demonstrate **any one** (not all) of those failures on part of the chargee, then the chargor manages to show cause to the contrary under s. 256(3). In other words, the chargee, in order to obtain an order for sale, must satisfy all those conditions i.e. there must be a demand made; form 16D served on the chargor and the sum claimed in the notice of demand must be lawfully due from the charge, and all other conditions prescribed in the charge documents.

The length of the period, in both cases, can be one month or such alternative period as may be specified in the charge. The law allows the parties i.e. the chargor and the chargee to specify alternative period for that purpose. That period specified in the charge may be longer or may be shorter than one month. Clause 29 of the charge annexure clearly specified as follows:

In the event of any breach by the Chargor of any of the agreements covenants terms stipulations and undertakings herein provided and on the part of the Chargor to be observed and performed (including the agreement of covenant to pay the sum for the time being owing to the Bank on demand as aforesaid) occurring and continuing for a period of not less than seven (7) days it shall

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- a* be lawful for the Bank forthwith to give the statutory notice pursuant to the provisions of the National Land Code requiring the Chargor to remedy the said breach within a period of not less than seven (7) days and service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as herein before provided or as may be prescribed by the National Land Code.

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In *Citibank Bhd v. Mohamed Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739, the Court of Appeal held that:

- c* When Parliament enacted s. 254(1) of the code and employed therein the words “**or such alternative period as may be specified in the Charge**”, it clearly intended by that phrase to alter the law by enabling a chargee to impose a period of less than a month. The Code in s. 254 therefore expressly permits a chargor by contract to accept a statutory notice of less than one month.

- d* Hence the seven days period stated in the plaintiff’s notice of demand dated 17 November 1999 as well as in the said form 16D dated 9 December 1999 are in accordance with the provisions of the charge and the s. 254 NLC.

- e* The defendants also questioned the validity of the notice of demand dated 17 November 1999 on the ground that even though the notice gave seven days period (from the date of the letter 17 November 1999) for the defendants to settle the sum due, the said notice was only received by them on 19 November 1999, leaving behind only five days for the defendants to make settlement. They argued that in actual fact, they were given less than seven days to settle the sum due. This, to the defendants, was contrary to cl. 29 of the charge annexure.

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- g* It must be born in mind that the defendants liability to pay the plaintiff under cl. 1.1 of the charge annexure is based on demand made by the plaintiff. Under cl. 29 and s. 254 NCL, the plaintiff is entitled to issue form 16D if the breach on part of the chargor to settle the amount due on the notice of demand had been accruing and continuing for a period of not less than seven days. In the present case, the defendants admitted having received the notice of demand (dated 17 January 1999) on 19 November 1999 and the plaintiff issued the said form 16D NLC on 9 December 1999. Even if the seven days period given under the notice of demand was to start from 19 November 1999 when the defendants received the said notice (as contended by the defendants), this would mean that the period ended on 26 November 1999, after which the defendants, as chargors, were in default or in breach of the charge annexure. This default was accruing and continuing from 27 November 1999 to

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9 December 1999 (when the plaintiff issued form 16D) for a continuous period of 12 days. This is obviously more than seven days as specified in cl. 29 of the charge annexure. Therefore the defendants have no ground to complain about it. In fact, they were given more time to settle the amount due. The defendants were not prejudiced at all. There is no irregularity or non-compliance with the charge annexure as well as the NLC.

The second ground raised by the defendants on this issue is that the said form 16D was issued and signed by the plaintiff's solicitors, not by the plaintiff.

Form 16D is a statutory notice which may be served by the chargee on the chargor under s. 254(1) NLC. There is nothing in the said section to say that the said form 16D must or shall be issued and signed by the chargee personally. Looking at the form itself, the column for signature (at the bottom end of the form) clearly indicates "signature (or other form of execution) **by or on behalf of chargee**". This shows that the said form 16D can be issued and signed by any other person including a solicitor, "on behalf of the chargee". Section 62 of the Interpretation Act 1967 seems to support this finding. The said s. 62 says:

Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation had no substantial effect and is not calculated to mislead.

In *Jacob v. Oversea – Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161, Suffian LP, in dealing with form 16D and 16E NLC, had said:

The object of the legislation is to see that sufficient notice is given to the chargor before the chargee applies for an order of sale.

In *Bank Bumiputra Malaysia Bhd v. Mahmud Hj Mohamed Din & Anor* [1989] 1 CLJ 1048, Peh Swee Chin J, had also ruled:

That the statutory notice of default must have been enacted with the object of giving sufficient notice to a chargor before an order of sale by public auction is applied for.

His Lordship went on to say that "after all, the minor irregularity complained of did not go to the roots of the chargor's right". In *Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd* [1984] 1 MLJ 115, the Federal Court had also ruled that s. 62 of the Interpretation Act 1967 should also be applicable to form 16D NLC. It was further held by Mohamed Azmi FJ

- a* (in that case) that form 16D was valid as it did not prejudice nor misled the chargor. The decision was upheld by the Privy Council's decision: (1986 MLJ 253).

- b* On the above observations, I have no hesitation to hold that the said form 16D in our present case, which was issued and signed by the plaintiff's solicitors "on behalf of the plaintiff" is perfectly valid and in accordance with the NLC. There is no indication at all to show that the defendants were prejudiced or misled.

5th Issue: Issue Of *Res Judicata*

- c* It is not disputed that the plaintiff had, before the present Originating Summons, filed another application for an order for sale on the same property *vide* Mahkamah Tinggi Temerloh, Saman Pemula No: 24-123-98 and that application had been dismissed with cost on 28 September 1999 and no order
- d* for sale was granted. In view of this, the defendants is now contending that the issue of *res judicata* is applicable to the present proceeding – i.e. the plaintiff is barred from taking the present proceeding. What is *res judicata*?

- e* Peh Swee Chin FCJ, in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 explained *res judicata* in the followings passage:

- f* It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of
- g* *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

In *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8, Seah SCJ speaking of an order for sale said (at p. 9):

- h* Here, there was no judgment debt. The claim of appellant in the Court below was in exercise of their statutory remedy against the respondent as Chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge.

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In *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332, Eusoff Chin SCJ (as he then was), set out the relevant law as follows: a

The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment or a decree. The Court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. b
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His Lordship further held that:

It is equally settled law that in order for the doctrine of *res judicata*, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree; *16 Halsbury's Law of England* (4th Edn) para 1519. This requirement is not met by foreclosure proceedings which, as we have observed earlier, do not result or terminate in a final judgment or decree. d

In an earlier case *VRKRS Chettiappah Chetty v. Raja Abdul Rashid Ibni Almarhum Sultan Idris* [1933] MLJ 18, Thorne Ag CJ, in dealing with the question of foreclosure proceedings, had said: e

The proceedings result not in a judgment or decree, but in making or refusal of an order of sale.

The above principle was followed in another Supreme Court decision in *Low Lee Lian's* case (*supra*). f

On the above authorities, which are binding on this court, my conclusion on this issue is that the doctrine of *res judicata* does not apply to the present proceeding and the plaintiff is not barred from taking and proceeding with the present application for an order for sale of the said property despite the fact that an earlier application *vide* Saman Pemula No: 24-123-98 had been filed and dismissed. Hence, the issue raised by the defendants is without merit and to be disregarded. g

h

i

a **Conclusion**

I have dealt with all the issues raised by the defendants. Accordingly I have concluded that all those issues are baseless and without merits. In the premise, I have no other alternative than to conclude that the defendants has failed to establish the existence of 'cause to the contrary' for the purpose of s. 256(3) NLC. Accordingly, I am making an order for sale of the said property as prayed by the plaintiff in encl. 4

*c**d**e**f**g**h**i*